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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York,
Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*

Appeal from the Court of Errors and Appeals of State of New Jersey.

REPLY BRIEF FOR APPELLANT.

JAMES D. CARPENTER, JR.,
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Appeal from the Court of Errors and Appeals of the State of New Jersey.

REPLY BRIEF FOR APPELLANT.

POINT I.

Answering the contention that the Superintendent of Banks is a mere receiver, without authority to enforce the assessment in jurisdictions other than New York (brief of Bobdon, *et al.*, pages 2-8; brief of Anderson, *et al.*, pages 34-36).

In arguing that the New York Superintendent of Banks is a mere receiver, appellees have confused his status as liquidator of the assets of the Bank with his wholly different position in enforcing the assessment. Under the New York law the Bank has no title to or right to enforce the assessment (*Van Tuyl* v. *Schwab*, 165 App. Div. 412, 150 N. Y. Supp. 786; *Broderick* v. *Adamson*, 146 Misc. 414, 262 N. Y. Supp. 204; *Broderick* v. *Adamson*, 148 Misc. 353, 265 N. Y. Supp. 804; *Broderick* v. *Britting*, 147 Misc. 363,

264 N. Y. Supp. 8), which is a direct liability of stockholders to creditors, and is enforced by the Superintendent solely on their behalf (*Hirshfeld* v. *Fitzgerald,* 157 N. Y. 166; *Farnsworth* v. *Wood,* 91 N. Y. 308; *Van Tuyl* v. *Scharmann,* 208 N. Y. 53. *Cf. Lantry* v. *Wallace,* 97 Fed. 865, *aff'd* 182 U. S. 536). Thus, in prosecuting or defending claims by or against the Bank the Superintendent acts in the name of the Bank (*New York Banking Law,* §71), whereas in enforcing the *assessment* he acts in his own name as Superintendent of Banks (*New York Banking Law,* §§80, 120). Stockholders who are depositors are not permitted to offset their deposit balances against the assessment liability since their deposit claims are against the Bank, which has no interest in the assessment liability (*Van Tuyl* v. *Schwab,* 165 App. Div. 412, 150 N. Y. Supp. 786; *U. S. Trust Co.* v. *U. S. Fire Ins. Co.,* 18 N. Y. 199; *Richards* v. *Schwab,* 101 Misc. 128, 167 N. Y. Supp. 535; *Barnes, et al.* v. *Trevor, et al.,* 45 App. Div. 314; 61 N. Y. Supp. 85; *aff'd* 169 N. Y. 611; *Broderick* v. *Adamson,* 146 Misc. 414, 262 N. Y. Supp. 204; *Broderick* v. *Adamson,* 148 Misc. 353, 265 N. Y. Supp. 804; *Broderick* v. *Britting,* 147 Misc. 363, 264 N. Y. Supp. 8). Thus, assuming for the purpose of the argument that in liquidating the assets of the Bank the Superintendent is a statutory receiver (*Isaac* v. *Marcus,* 258 N. Y. 257; *Matter of Union Bank,* 204 N. Y. 313; *Lafayette Trust Co.* v. *Higginbotham,* 136 N. Y. App. Div. 747), this has no relation to or bearing upon his wholly independent position in enforcing the assessment. In the latter case he acts as agent or trustee on behalf of creditors pursuant to a statute which vests in him title to the cause of action (*Converse* v. *Hamilton,* 224 U. S. 243; *Broderick* v. *McGuire,* 119 Conn. 83; *Clark* v. *Williard,* 292 U. S. 112).

This distinction disposes of all of the authorities referred to in the brief submitted on behalf of appellees, Bobdon, *et al.*, pages 2-8, and the brief of appellees, Anderson, *et al.*, pages 34-36, which relate only to the status of the Superintendent as liquidator. The Court in *Van Tuyl* v. *Carpenter*, 135 Tenn. 629, 188 S. W. 234, relied upon by appellees, obviously erred in amalgamating the status of the Superintendent as liquidator with his independent function in enforcing the assessment.

POINT II.

Answering the contention that the levy of an assessment by the New York Superintendent of Banks is not conclusive under the law of New York (brief of Anderson, *et al.*, pages 5-9).

It is not material that there has been no decision by the New York Court of Appeals on the precise question of the conclusive effect of the Superintendent's determination. The statute is clear, the lower court of New York has spoken (*Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353), and the conclusive effect of such determination has been judicially upheld generally wherever the question has been presented for decision. (See main brief for Appellant, pp. 17-38.)

Moreover, the New York Court of Appeals has repeatedly held that official action of public officers, including that of the Superintendent of Banks, is presumed to be valid within the limitations referred to in our main brief (see main brief of Appellant, pp. 17-32). This rule is indeed required, in order that the fundamental segregation and

independence of the judicial, legislative and executive branches of the state government be preserved (*Marbury* v. *Madison*, 5 U. S. (1 Cranch.) 135; *People* v. *Tremaine*, 252 N. Y. 27; *Matter of Richardson*, 247 N. Y. 401; *People ex rel. Broderick* v. *Morton*, 156 N. Y. 136; *East River Gas & Light Co.* v. *Donnelly*, 93 N. Y. 557; *Brady* v. *Mayor*, 112 N. Y. 480; *Mitchel* v. *Cropsey*, 177 App. Div. 663, 164 N. Y. Supp. 336; *Holly* v. *City of New York*, 128 App. Div. 499, 112 N. Y. Supp. 797; *Dillon* v. *Butler, Inc.*, 174 N. Y. Supp. 198, not officially reported).

Obviously, as pointed out in *Broderick* v. *Adamson, et al.*, 148 N. Y. Misc. 353 (main brief for Appellant, pp. 27-29), and *Matter of Union Bank*, 176 App. Div. 477 (main brief for Appellant, pp. 25-27), should a Court, upon mere differences of opinion, review and reverse the official action of the Superintendent upon the question of the necessity of the assessment, it would thereby improperly impose its own judgment upon a matter vested by statute in the sound discretion of the executive branch of the government. The rule that executive action is presumed to be valid, or in other words is conclusive in the absence of fraud, bad faith, or clear error of law, is thus but a recognition of this segregation of powers and necessary to preserve the independence of the executive. The mere application of this fundamental doctrine to the levy of an assessment by the Superintendent of Banks is not a controversial question which may be considered doubtful under the law of New York in the absence of specific treatment by the New York Court of Appeals. The rule of *Broderick* v. *Adamson, et al.*, 148 Misc. 353, is thus a reiteration of a fundamental principle firmly imbedded in the jurisprudence of New York.

Section 80 provides that the Superintendent may execute a certificate reciting his determination and setting forth the value of the assets and the amount of the liabilities of the bank. Under the statute this certificate is "presumptive evidence" of the facts recited. But this does not conflict with our position that the determination, as an official act, is entitled to the conclusive weight and effect ordinarily attaching to executive action. In the absence of this provision of the statute, it would be necessary for the Superintendent to establish by other oral or documentary evidence that he had made an official determination of the necessity of the assessment. The statute facilitates such proof by authorizing the execution of a certificate reciting his determination to levy the assessment and the facts upon which the determination was based. It thereby becomes unnecessary for the Superintendent or his deputies personally to appear upon a trial in order to establish that the determination was made. This does not impair the official character of the determination. Stated differently, the mere provision that a certificate reciting the determination and the facts upon which it was based shall be presumptive evidence of the facts recited, does not deprive the determination of its official character or conclusive effect.

POINT III.

Answering the argument that executive acts of state officers are not "public acts" within the full faith and credit clause of the Constitution (brief of Anderson, *et al.*, pages 6-8).

Appellees contend that the full faith and credit clause of the Constitution applies only to state legislation, and that although the determination by the New York Superintendent of Banks of the necessity of an assessment is an official act of a public officer of New York, it is not a "public act" within the meaning of the Constitution. In support of this argument, the first draft of the full faith and credit clause before the Committee of Detail of the Constitutional Convention is referred to. This draft provides:

> "Full faith and credit shall be given in each state to the acts of the legislature and to the records and judicial proceedings of the courts and magistrates of every other state" (Story on Constitution, 4th ed., vol. 2, Section 1303).

When the Constitution was finally adopted, the clause "acts of the legislature" was eliminated, and in its place was inserted the more general phrase, "public acts" (*Constitution*, Art. IV, §1). Appellees reason from this that the term "public acts" in the Constitution as finally adopted was intended to refer solely to "acts of the legislature", which is the language of the draft. The contrary, however, was obviously intended. Had the purpose been to restrict the operation of the full faith and credit clause to state statutes, the explicit language of the draft would have

been retained. The elimination of this restrictive language and the adoption in the Constitution of the broader term "public acts" constitutes recognition by the framers of the Constitution of the desirability of requiring faith and credit not only of acts of the legislature, public records and judgments, but also of all proclamations, orders, certificates and determinations of executive officers. Public acts may properly be said to include all official actions made and taken under the lawful authority of a sovereign state. The words include "acts of the legislature"; they include official action taken by the state through its designated officers or agents pursuant to state law. "Public acts" are words of the broadest comprehension; they are not restrictive. Like the words "due process of law" they are all inclusive. They were intended to accord full faith and credit in other states to whatsoever a state may do in the orderly exercise of its governmental functions.

This Court has never to our knowledge limited the words "public acts" as used in the Constitution to legislation. In view of the modern tendency to delegate numerous and vital functions of government to executive officers, a broad interpretation of the constitutional provision which will embrace within this phrase not only state legislation but also executive action thereunder, is required and necessary.

POINT IV.

Answering the contention that the certificate of the Superintendent reciting his determination to levy the assessment and the facts upon which such determination was based, need not be recognized by New Jersey under the full faith and credit clause of the Constitution (brief of Anderson, *et al.*, pages 5, 6).

It is argued that the certificate of the Superintendent is merely "presumptive evidence" under the law of New York, and is therefore entitled to no faith and credit in any other jurisdiction. But the certificate of the Superintendent is more than an ordinary written instrument having mere evidentiary value under the law of New York. It is a document prepared and executed by a public officer pursuant to statute and in the course of the performance of official duties (*New York Banking Law*, §80). Section 11 of the New York Banking Law provides as follows:

> "Official seal of superintendent; sealed instruments to be received in evidence and recorded.—The secretary of state shall provide the superintendent of banks with an official seal. Every paper executed by him as such superintendent in pursuance of any authority conferred on him by law, and sealed with his seal of office, shall be received in evidence, and may be recorded in the proper recording offices in the same manner and with the same effect as a deed regularly acknowledged."

Under this statute, the certificate of the Superintendent is an official document entitled to permanent preservation as a public record of the State of New York. Under Article

IV, Section 1, of the Constitution, public records are entitled to full faith and credit. Pursuant to its constitutional authority, Congress has provided the faith and credit to which public records of one state are entitled in the courts of another. Thus, United States Revised Statutes, Section 906 (28 U. S. C. A., §688), provides as follows:

> "PROOFS OF RECORDS IN OFFICES NOT PERTAINING TO COURTS.' All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said testation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. *And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.*" (Italics ours.)

The certificate of the Superintendent of Banks, being a public record of the State of New York, is therefore under this act of Congress entitled to the same force and effect in the Courts of New Jersey as is given to such certificate "by law • • • in the courts • • • of the state • • •" from which it is taken, in other words, in the courts of New York. It is equally obvious that since Section 94b of the New Jersey Corporation Act prohibits the institution of any action upon the assessment (main brief for appellant, pp. 74-82), it necessarily operates to deprive this public record of New York of that faith and credit required under the Constitution of the United States and the federal statute above quoted.

POINT V.

Answering the contention that under the Constitution New Jersey is not required to give full faith and credit to Article VIII, Section 7, of the New York Constitution or Sections 80 and 120 of the New York Banking Law (brief of Anderson, *et al.*, pages 6-8, 15-22; brief of Bobdon, *et al.*, page 18; brief of Rosner, *et al.*).

It is urged that the full faith and credit clause of the Constitution requires enforcement of judgments, but not of state statutes (*Brief of Anderson, et al.*, pp. 6-8, 15-22; *Brief of Bobdon, et al.*, p. 18). Appellees contend that the constitutional provision is not self-executing, citing *McElmoyle* v. *Cohen*, 13 Peters 312, *Alabama State Bank* v. *Dalton*, 9 How. 522, *Roller* v. *Murray*, 234 U. S. 738, and *Tilt* v. *Kelsey*, 207 U. S. 43 (*Brief of Anderson, et al.*, pp. 15-16), and that the operation of the full faith and credit clause de-

pends entirely upon Revised Statutes, Section 905 (Act May 26, 1790, c. 11, 1 Stat. 122, U. S. C. A., Title 28, §687).

The simple question is thus presented, whether the laws of New York providing that stockholders of New York banks shall be liable for an assessment must be recognized by New Jersey.

The Constitution specifically provides that full faith and credit be given not only to "judicial proceedings" but also to "records" and "public acts"; and it is conceded by appellees that the Constitution and Banking Law of the State of New York are "public acts" within the meaning of this provision of the Constitution of the United States (*Brief of Anderson, et al.*, p. 8; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 154).

There is no merit to the suggestion that, aside from Revised statutes, Sections 905 and 906 (Act of May 26, 1790, c. 11, 1 Stat. 122, U. S. C. A., Title 28, §§687, 688), the full faith and credit clause of the United States Constitution is a dead letter and utterly meaningless. Nothing said or held in *McElmoyle* v. *Cohen*, 13 Peters 312, *Alabama State Bank* v. *Dalton*, 9 How. 522, *Roller* v. *Murray*, 234 U. S. 738, or *Tilt* v. *Kelsey*, 207 U. S. 43, relied on by appellees, supports their statement. On the contrary, in *McElmoyle* v. *Cohen*, it is specifically stated at pages 324 *et seq:*.

> "* * * The authenticity of a judgment and its effect, depend upon the law made in pursuance of the Constitution; the faith and credit due to it as the judicial proceeding of a State, *is given by the Constitution, independently of all legislation.* * * *"* (Italics ours.)

Similarly, the manner of proving state legislation may depend upon congressional legislation, but the Constitution

provides, independent of all congressional enactment, that public acts of each state are entitled to full faith and credit.

Again, Section 905 specifically refers not only to judicial proceedings but also to the acts of the legislature of states, and provides a method for their authentication. If such acts of the legislature were entitled to no faith and credit, there would have been no purpose to this congressional provision for the manner of establishing the authenticity of such acts. The obvious conclusion required by the constitutional provision and the act of Congress pursuant thereto, is that not only judicial proceedings but also public acts of states are entitled to full faith and credit. We may assume for the argument, that ordinarily, the operation of state legislation is confined within the borders of the state. This is not so, however, when contract rights in assessments against stockholders arising upon or flowing from legislation of the state of incorporation became vested in that state under its laws.

Considerations of practicality and policy similar to those emphasized by this Court in the fraternal society cases (Main Brief for Appellant, pp. 42-48) apply equally, if not with greater force, to the enforcement of assessments against stockholders of banks provided by the laws of the state of incorporation. The widespread importance of maintaining the financial soundness and solvency of banking institutions and of providing methods whereby depositors may be repaid in full in the event of insolvency, has been demonstrated so clearly by the recent financial crisis as to need no extended discussion.

Moreover, there is, and indeed there properly can be no public policy in New Jersey against the enforcement of the assessment liability against stockholders of banks of

foreign states. Thus the fact that New Jersey does not provide that stockholders of its banks shall be liable for an assessment is no evidence that the enforcement of assessments levied under the laws of the State of New York is obnoxious to the public policy of New Jersey (*Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145; *Broderick* v. *McGuire, et al.*, 119 Conn. 83). Further, the very provisions of Section 94b of the New Jersey Corporation Act establish that such enforcement is not obnoxious to its public policy. That act attempts affirmatively to provide a method for the enforcement of such assessments in New Jersey. Through inadvertence, or failure adequately to consider the varied assessment statutes of other states, or the principles governing service of process, this statute operates to bar and prohibit enforcement of such assessments in New Jersey (Main Brief for Appellant, pp. 74-82). But this is a consequence of legislation, which, rather than indicating a public policy of New Jersey against enforcement of such assessments, on the contrary merely specifies conditions to enforcement which while designed to be fair to New Jersey residents operate to deny all remedy.

But aside from this, it has been held by this Court that the state of incorporation shall have the exclusive right to determine whether stockholders shall be liable in addition to their subscriptions, and that no other state may in this situation have an adverse public policy. Thus, in *Converse* v. *Hamilton*, 224 U. S. 243, at page 260 this Court said in relation to the Minnesota assessment statutes:

> "• • • The subject to which chapter 272 is addressed is peculiarly within the regulatory power of the state of Minnesota; *so much so that no other*

state properly can be said to have any public policy thereon. * * *" (Italics ours.)

See also, *Bond* v. *Hume*, 243 U. S. 15.

Nothing said or held in *Texas & Pac. R. R. Co.* v. *Cox*, 145 U. S. 593, *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, *Atchison, Topeka, etc., Co.* v. *Nichols*, 264 U. S. 348, *Spokane I. E. R. Co.* v. *Whitley*, 237 U. S. 487, or *Union Trust Co.* v. *Grossman*, 245 U. S. 412, relied upon by appellees, conflicts with our contention. In none of these cases was the full faith and credit clause of the Constitution raised by the parties. Indeed, in *Texas & Pac. R. R. Co.* v. *Cox*, 145 U. S. 593, *Dennick* v. *Central R. Co.*, 103 U. S. 11, *Atchison, Topeka, etc., Co.* v. *Nichols*, 264 U. S. 348, *the duty to give effect to statutes of other states which could not properly be said to be obnoxious to the policy of the forum, was recognized.*

We revert to the contention appearing at pages 6 to 8 of the brief of appellees, *Anderson, et al.*, that the determination by the New York Superintendent of Banks of the necessity of the assessment is not a public act entitled to full faith and credit in New Jersey: But if we are correct in our main contention that New Jersey must recognize and give effect to Section 80 of the New York Banking Law, it follows that New Jersey must also recognize the acts of the Superintendent pursuant thereto, and which are necessary in order to render the statute operative and effective. In other words, the Constitution cannot be satisfied by the mere device of recognizing the statute while at the same time disregarding those acts taken pursuant to the statute and which are essential to its execution (*Converse* v. *Hamilton*, 224 U. S. 243).

POINT VI.

Answering the contention that Section 94b of the New Jersey Corporation Act does not deprive the New York Superintendent of Banks and, through him, the creditors of the Bank of United States of property without due process of law (brief of Bobdon, *et al.*, pages 20-22; brief of Anderson, *et al.*, pages 29-32).

It is significant that appellees attempt to sustain the New Jersey statute under the due process clause of the Constitution upon the contention that it provides a remedy adequate for the occasion and is not invalid merely because it is difficult to comply with the statute. This necessarily implies a concession that if Section 94b is an absolute bar to the enforcement of the assessment in New Jersey, it deprives plaintiff and through him the creditors of The Bank of United States of property without due process of law. (Main Brief for Appellant, pp. 74-76.)

In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, Mr. Justice Roberts, speaking for this Court, said:

> "Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws, *it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations.* * * * *A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts*

of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.'' (Italics ours.)

POINT VII.

Answering the contention that although it may be difficult it is not impossible to comply with the requirements of Section 94b (brief of Anderson, *et al.*, pages 31-32; brief of Bobdon, *et al.*, page 22).

It is urged that the difficulties confronting plaintiff in attempting to comply with Section 94b arise not because of any defects in the New Jersey statute but solely because of the vast number of depositors and stockholders of The Bank of United States. Thus, it is argued that the remedy of Section 94b is reasonable and adequate where recovery is sought in actions against stockholders of insolvent banks having few stockholders and creditors. But appellees overlook the requirement of Section 94b that all creditors and all stockholders as well as the insolvent foreign corporation are ''necessary parties'' to the action. It is therefore essential to recovery in New Jersey that personal service be effected upon or jurisdiction be properly obtained over non-residents. The bank being a foreign corporation jurisdiction must be obtained by personal service to be valid and effectual. Thus no matter how limited in number are the creditors and stockholders of the foreign corporation, it is impossible to obtain jurisdiction over all of these ''necessary parties''. It therefore follows that under Section 94b no action upon an assessment may be maintained in that state.

POINT VIII.

Answering the contention that New Jersey may bar enforcement of contract rights vested under statutes of other states through withdrawing jurisdiction from its courts (brief of Anderson, *et al.*, pages 9-13; brief of Bobdon, *et al.*, pages 15-18; brief of Rosner, *et al.*).

The position of appellees appears to be (1) that Section 94b withdraws jurisdiction from the Courts of New Jersey to hear the present controversy; and (2) that each state has the exclusive right to withdraw jurisdiction from its Courts. The full faith and credit clause of the Constitution, it is argued, operates only where there is a State Court with adequate jurisdiction over the subject matter of the controversy which refuses to accept as evidence properly authenticated statutes, judgments and public records of other states.

(1) This action was commenced in the New Jersey Supreme Court. The jurisdiction of the New Jersey Supreme Court is both original and appellate. Its jurisdiction is accurately stated in "The Courts of New Jersey" by Clevenger and Keasbey, 1903. Speaking of the original jurisdiction of the Supreme Court this work says:

> "It has original cognizance of all actions and demands at common law, whether real, personal or mixed. In general it possesses all the common law jurisdiction of the several courts of King's Bench, Common Pleas and Exchequer in England, unless where specially restrained by the constitution."

The New Jersey Court of Errors and Appeals said in *Flanigan* vs. *Guggenheim Smelting Company*, 63 N. J. L., 647, at page 650:

> "Section 1, of article 7, of the constitution provides that 'the judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachment; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish as the public good shall require'.
>
> It will be admitted that these provisions guarantee the integrity of the constitutional courts, of which the Supreme Court is one. Whatever powers that court had, whatever jurisdiction that court exercised, at the date of the adoption of the constitution, were by such adoption incorporated into the fundamental law and ensured against destruction or abridgment except through a change in the fundamental law itself. To abolish the court, to alter its organic character, to impair its jurisdiction, to diminish its authority, are beyond legislative power, because that character, jurisdiction and authority form part of a body of law which, upon wise grounds, has been made immutable by any mere legislative act."

In *Graham* vs. *Fleissner*, 107 N. J. L., 278 (1930), the Court of Errors and Appeals affirmed a judgment entered in the Supreme Court for an assessment upon an unpaid subscription against a stockholder of a Delaware corporation, levied in a bankruptcy proceeding against the corporation in New York. There is no distinction between the form of action to recover on an assessment duly levied

against stockholders for unpaid stock subscriptions, and an assessment levied by a superintendent of banks against stockholders of a bank to recover their double liability as stockholders. [Compare: *Schriver* v. *Woodbine Savings Bank*, 285 U. S. 467, with cases cited in main brief for appellant, pp. 16, 17; see also *Kennedy* v. *Gibson*, 75 U. S. 476; *Studebaker* v. *Perry*, 184 U. S. 258, and *Broderick* v. *American General Corporation, et al.*, 71 Fed. (2d) 864.]

In this situation it is clear that Section 94b does not, and cannot affect the *power* or jurisdiction of the New Jersey Supreme Court. Thus we believe it clear that had the New Jersey Supreme Court entered judgment for plaintiff against any of the defendants, this judgment would be enforcible in any other state and could not be impeached on the ground that the judgment was entered without jurisdiction. This question was discussed in *Fauntleroy* v. *Lum*, 210 U. S. 230. In that case a Mississippi statute provided that dealing in futures shall be a misdemeanor and that such contracts "shall not be enforced by any court." This statute, it was held, did not go to the jurisdiction of the Mississippi Court but merely sought to impose a duty upon it to dismiss such an action if instituted. This Court, speaking through Mr. Justice Holmes, said:

> "The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, 'shall not be enforced by any court.' Annotated Code of 1892, §§1120, 1121, 2117. The defendant contends that this language deprives the Mississippi courts of jurisdiction, and that the case is like Anglo-American Provision Co. *v.* Davis

Provision Co., 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92. • • •

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. *When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.*

"The case quoted concerned a statute plainly dealing with the authority and jurisdiction of the New York court. The statute now before us seems to us only to lay down a rule of decision. The Mississippi court in which this action was brought is a court of general jurisdiction and would have to decide upon the validity of the bar, if the suit upon the award or upon the original cause of action had been brought there. The words 'shall not be enforced by any court' are simply another, possibly less emphatic, way of saying that an action shall not be brought to enforce such contracts. As suggested by the counsel for the plaintiff in error, no one would

> say that the words of the Mississippi statute of frauds, 'An action shall not be brought whereby to charge a defendant,' Code 1892, §4225, go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt. See 191 U. S. 375, 48 L. ed. 227, 24 Sup. Ct. Rep. 92. A stronger case than the present is General Oil Co. *v.* Crain, 209 U. S. 211, 216, *ante*, 754 758, 28 Sup. Ct. Rep. 475." (Italics ours.)

Similarly, Section 94b which merely provides that "no action or proceeding shall be maintained in any court of law of this state" and further "no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting" does not, and cannot affect the general jurisdiction of the New Jersey Supreme Court over the present cause of action based upon contract.

(2) Appellees rely upon *Missouri* v. *Lewis*, 101 U. S. 22; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, and *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, to sustain their position that no withdrawal by a state of jurisdiction from its courts can be considered invalid under the Constitution of the United States. These cases are, however, readily distinguishable and a complete study of the principle involved furnishes ample precedent for the contrary proposition.

Thus, *Missouri* v. *Lewis*, 101 U. S. 22, involved the following facts: Under the Constitution and laws of Missouri, appeals to the Court of last resort in that state were

allowed only in enumerated instances and not from a judgment removing attorneys from practice at the bar. The petitioner applied for mandamus to compel the Courts of Missouri to permit an appeal to the Court of last resort, and from a denial of the writ appealed to this Court. In affirming the judgment of the Court below, this Court pointed out that under the Missouri judicial system, the petitioner had had the benefit of an appeal and that the refusal to permit an appeal to the Court of last resort in that jurisdiction violated no constitutional requirement. The case, therefore, has no bearing upon the present appeal.

Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265, was an action originally instituted in this Court by the State of Wisconsin upon a judgment recovered by said state against a Louisiana corporation doing business in Wisconsin for a penalty imposed by the statutes of that state. This Court held that its original jurisdiction to hear suits by a state against citizens of other states applied only where the litigation is of a civil character and not where the action is to recover upon a penal statute. Thus the precise question presented for determination did not remotely involve the full faith and credit clause of the Constitution.

In discussing and distinguishing various state decisions, the Court referred to the full faith and credit clause as merely evidentiary. It is upon this portion of the opinion that appellees rely. This portion of the opinion subsequently came up for consideration in *Fauntleroy* v. *Lum*, 210 U. S. 230. There the following facts were involved. A contract dealing with cotton futures was made in Mississippi. The laws of Mississippi provided that such transactions constituted misdemeanors and were unenforcible. Thereafter the contract was submitted for arbitration in Mississippi

and its illegality was not raised by the defendant and an award rendered against him. The defendant failed to pay and subsequently the plaintiff finding the defendant in Missouri, commenced an action there. In the Missouri action the Trial Court refused to allow the defendant to show the illegal nature of the transaction but directed the jury to return a verdict for the plaintiff if it found that an award was made in Mississippi and remained unpaid. The jury returned a verdict for the plaintiff and judgment was thereupon entered. Subsequently an action was commenced in Mississippi against the defendant upon the judgment obtained in Missouri. In that action the defendant established that the original transaction was illegal and void and the defense was sustained by the Mississippi Courts. Upon appeal to this Court it was argued that the full faith and credit clause of the Constitution is merely evidentiary and under the authority of *Wisconsin* v. *Pelican Ins. Co., supra,* did not prevent the Mississippi Court from reviewing the issues determined in Missouri or rendering a verdict against the plaintiff on the ground that the underlying transaction countervened its public policy. In rejecting this contention, this Court said:

> "But the law is supposed to have been changed by the decision in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. • • • However, the whole passage was only a *dictum* and it is not worth while to spend much time upon it."

Appellees also rely upon *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373. That was an action brought in New York by one foreign corporation against a second foreign corporation upon a judgment recovered in

a state other than New York. Upon motion, the complaint was dismissed under Section 1780 of the New York Code of Civil Procedure, which provided that actions by one foreign corporation against another may be prosecuted in New York only where the cause of action arose in New York. The dismissal of the complaint was affirmed by the New York Court of Appeals. Thereupon an appeal was taken to this Court upon the ground that the New York Code was unconstitutional. In sustaining the right of New York in this stituation to withhold jurisdiction from its Courts, this Court pointed out that it is a general power of one state "to restrict the right of a foreign corporation to sue in its courts".

The identical principle relied upon by appellees that under this decision a state may escape its constitutional obligations by withdrawing jurisdiction from its Courts was directly presented and passed upon in the subsequent decision of *Kenney* v. *Loyal Order of Moose*, 252 U. S. 411. There a judgment was recovered in Alabama against the defendant for negligently causing the death of plaintiff's intestate in Alabama. Thereafter an action was instituted upon the Alabama judgment in Illinois. The defense pleaded and sustained by the Illinois Court was that under the Illinois statutes no action could be maintained in its courts for damages occasioned by death occurring in another state through negligence whether instituted originally in Illinois or commenced upon a judgment recovered in another state. In reversing, this Court held:

> "In the court below and in the argument before us reliance was placed upon Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92, and language in Wis-

consin *v.* Pelican Ins. Co., 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, the former as showing that the clause requiring full faith and credit to be given to judgments of other state does not require a state to furnish a court, and the latter as sanctioning an inquiry into the nature of the original cause of action in order to determine the jurisdiction of a court to enforce a foreign judgment founded upon it. But we are of opinion that the conclusion sought to be built upon these premises in the present case cannot be sustained.

"Anglo-American Provision Co. *v.* Davis Provision Co. was a suit by a foreign corporation on a foreign judgment against a foreign corporation. *The decision is sufficiently explained without more by the views about foreign corporations that had prevailed unquestioned since Bank of Augusta* v. *Earle,* 13 Pet. 579, 589-591, 10 L. ed. 303, 308, 309, cited 191 U. S. 375, 48 L. ed. 227, 24 Sup. Ct. Rep. 92. Moreover, no doubt there is truth in the proposition that the Constitution does not require the state to furnish a court. *But it also is true that there are limits to the power of exclusion and to the power to consider the nature of the cause of action before the foreign judgment based upon it is given effect.*"

• • • • • •

"'• • • *it is plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.* • • •'" (Italics ours.)

Nothing said or held in *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230, sustains appellees. On the contrary, in that case the Court specifically said that "the power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard

in them is, of course, subject to the restrictions imposed by the Federal Constitution".

In the present instance, New Jersey has no real or substantial interest in the subject matter of the litigation, or proper public policy adverse thereto (*Converse* v. *Hamilton*, 224 U. S. 243). It follows that its refusal to permit enforcement of assessment rights whether by affirmative legislation or by the device of the statute under consideration is invalid under the due process and full faith and credit clauses of the Constitution.

POINT IX.

The judgment below should be reversed and the action remanded to the New Jersey courts for further proceedings in accordance with the provisions of the Constitution of the United States.

Respectfully submitted,

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